13

(2)

FILED
NOV 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-533

IN THE

Supreme Court of the United States

EUGENE MONGEAU,
Petitioner,

v.

CITY OF MARLBOROUGH AND STEPHEN REID,
INDIVIDUALLY AND AS COMMISSIONER OF
INSPECTIONAL SERVICES AND AS A MEMBER OF
THE CITY OF MARLBOROUGH SITE
PLAN REVIEW COMMITTEE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

Leonard H. Kesten
Counsel of Record
Judy Levenson
Deidre Brennan Regan
Brody, Hardoon, Perkins & Kesten LLP
One Exeter Plaza
Boston, MA 02116
(617) 880-7100

Counsel for Respondents

November 21, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the First Circuit Court of Appeals, reaffirming its earlier holdings, properly ruled that a plaintiff in a land-use dispute must prove that a defendant engaged in behavior that "shocks the conscience" in order to prevail on a substantive due process claim and that this standard had not been met here?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

RESPONSE TO PETITIONER'S STATEMENT OF CONSTITUTIONAL PROVISIONS AT ISSUE 1

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 3

A. Facts 3

B. The District Court Decision 6

C. The First Circuit Decision 7

REASONS FOR DENYING THE PETITION 8

I. THE PETITION FAILS TO ACKNOWLEDGE OR CHALLENGE THIS COURT'S APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS*. 8

II. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S CIRCUIT ANALYSIS 10

III. APPLICATION OF A "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THIS COURT'S SUBSTANTIVE DUE PROCESS CASES 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Albright v. Oliver,
510 U.S. 266 (1994) 16

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) 16, 17

Banks v. City of Whitehall,
344 F.3d 550 (6th Cir. 2003) 14

Brody v. City of Mason,
250 F.3d 432 (6th Cir. 2001) 14

Camuglia v. City of Albuquerque,
448 F.3d 1214 (10th Cir. 2006) 18

Centres v. Town of Brookfield,
148 F.3d 699 (7th Cir. 1998) 15

Christianson v. County of Boone,
483 F.3d 454 (7th Cir. 2007) 16

City of Cuyahoga Falls v. Buckeye Community Hope Foundation,
538 U.S. 188 (2003) ..... *passim*

Collins v. City of Harker Heights,
503 U.S. 115, 112 S.Ct. 1061 (1992) 9, 13

Conroe Creosoting Co. v. Montgomery County Texas, 249 F.3d 337 (5th Cir. 2001) 13

County of Sacramento v. Lewis,
523 U.S. 833 (1998) ..... *passim*

Eichenlaub v. Township of Indiana, Pa.,
__ U.S. __, 128 S.Ct. 201
(U.S. Oct. 01, 2007)..... 1, 2, 10, 12, 16

Equity Lifestyle Prop. v. County of San Luis Obispo, 2007 WL 2694677 (9th Cir. 2007) 17

Fraternal Order of Police Dep't of Corrections Labor Comm. v. Williams, 375 F.3d 1141
(D.C. Cir. 2004) 19

General Acc. Ins. Co. of America v. Fidelity and Deposit Co. of Maryland,
598 F.Supp. 1223 (D.C.Pa. 1984) 5

Graham v. O'Connor,
490 U.S. 386 (1989) 16

Iowa Coal Mining Co. v. Monroe County,
257 F.3d 846 (2001) 18

Koscielski v. City of Minneapolis,
435 F.3d 898 (8th Cir. 2006) 18

Lingle v. Chevron,
544 U.S. 528, 125 S.Ct. 2074 (2005) 20

Madison v. Graham,
316 F.3d 867 (9th Cir. 2002) 16

Midkiff v. Adams County Regional Water District,
409 F.3d 758 (6th Cir. 2005) 15

Mikeska v. City of Galveston,
451 F.3d 376 (5th Cir. 2006) 13

Montgomery v. Stefaniak,
410 F.3d 933, 939 (7th Cir. 2005) 16

Natale v. Town of Ridgefield,
170 F.3d 258 (2d Cir. 1999) 11

O'Connor v. Pierson,
426 F.3d 187 (2d Cir. 2005) 11

O'Mara v. Township of Wappinger,
485 F.3d 693 (2d Cir. 2007) 11

Signature Props. Int'l Ltd. Partnership v. City of Edmond,
310 F.3d 1258 (10th Cir. 2002) 18

Simi Inv. Co. v. Harris County,
236 F.3d 240 (5th Cir.2000) 13

Singleton v. Cecil,
176 F.3d 419 (8th Cir. 1999) 18

Squaw Valley Dev. Co. v. Goldberg,
375 F.3d 936 (9th Cir. 2004) 16-17

Tri-County Paving, Inc. v. Ashe County,
281 F.3d 430 (4th Cir. 2002) 12

United States v. Al-Hamdi,
356 F.3d 564 (4th Cir. 2004) 13

Walz v. Town of Smithtown,
46 F.3d 162 (2d Cir. 1995) 11

Young v. City of Mt. Rainier,
238 F.3d 567 (4th Cir. 2001) 13

STATUTES:

U.S. CONST. AMEND. XIV 1, 6

42 U.S.C. § 1983 6

RESPONSE TO PETITIONER'S STATEMENT OF CONSTITUTIONAL PROVISIONS AT ISSUE

The Petitioner, Eugene Mongeau, lists the Fourteenth Amendment as the constitutional provision involved in this case. He, however, made no reference to this Amendment in his complaint and did not invoke the words "due process" therein. It was only subsequently that Mongeau explicated the grounds for his section 1983 claim, informing the United States District Court for the District of Massachusetts at a hearing that he was alleging procedural and substantive due process violations.

INTRODUCTION

The Respondents, City of Marlborough and Stephen Reid, Individually and as Commissioner of Inspectional Services and as a Member of the City of Marlborough Site Plan Review Committee, respectfully ask this Honorable Court to deny the certiorari petition. A Petition for a Writ of Certiorari, just recently before this Court in the matter of *Eichenlaub v. Township of Indiana, Pa.*, __ U.S. __, 128 S.Ct. 201 (U.S. Oct. 01, 2007), presented the very same issue as that here, and likewise claimed a split in the circuits over application of the "shocks the conscience" standard discussed in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Respondents in *Eichenlaub* opposed the Petition, refuting therein the Petition's claim of a division among circuit courts that called for this Court's intervention. This Court denied the *Eichenlaub*

Petition on October 1, 2007. This issue then has just recently been briefed to this Court. The Respondents incorporate much of the *Eichenlaub* Opposition here. As in *Eichenlaub*, the Petition here should be denied.

Indeed, as in *Eichenlaub,*

1. The Petition here does not mention or challenge this Court's application of the "shocks the conscience" standard enunciated in *Lewis* to a land use case in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation,* 538 U.S. 188, 198-199 (2003).

2. The Courts of Appeals' application of *Lewis* to substantive due process claims in land-use cases does not conflict with but rather implements this Court's precedents.

3. Current Supreme Court and Circuit case law provides no support for petitioner's suggestion that some other test should apply and refutes his specter of a "disarray, "conflict" or "intra-circuit confusion" in the Circuits on the issue.

Additionally, while the Petitioner, in the "Introduction" to his Petition, says this dispute arises from his "ultimately unsuccessful attempts to secure a valid building permit" and that he brought legal action as "a last resort," the fact is that his claim is not ripe. The Petitioner did not pursue a final decision regarding the application of the subject zoning ordinance and regulations to his property –

even though he had recourse via the Zoning Board of Appeal in terms of appealing the denial of his permit or reestablishing his variance.

Also, the United States District Court for the District of Massachusetts recited and applied the First Circuit's substantive due process law in dismissing the plaintiff's federal claim. The Petitioner never even argued to that Court that some other standard should apply.

COUNTERSTATEMENT OF THE CASE

A. Facts

The relevant facts are stated in the opinions of the First Circuit Court of Appeals and the United States District Court for the District of Massachusetts, both of which appear in the Appendix to the Petition for Writ of Certiorari. Respondents direct this Court's attention to the same, and submit that the Statement of Facts in the Petition miscasts or omits mention of key points, including the following:

1. In 1991, Mongeau had agreed to sell three parcels of land to the City in exchange for $450,000 and an acknowledgement by the City that Mongeau would be able to construct a "60 ft. by 80 ft. building" on a remaining tract "in full compliance with the building code and ordinance[s] of the City of Marlborough." Appendix A-2.

2. Some twelve years later, in 2003, Mongeau submitted an application to the Building Department to construct a 35 ft. by 40 ft. building on the subject tract. Respondent Reid denied the application, citing a lack of frontage and access as reasons. Appendix A-2.

3. Later that year, Mongeau submitted an application to build a 60 ft. by 100 ft. building on the site. Respondent Reid rejected the application, citing the building's lack of frontage and location on a former railroad right-of-way, and Mongeau's failure to submit the plan to the Site Plan Review Committee. Appendix A-3.

4. Mongeau appealed this second rejection of his application to the City's Zoning Board of Appeals ("ZBA"). Appendix A-3. In a memorandum, Respondent Reid expressed concern that the plaintiff's proposal sought substantial relief from the Zoning Ordinance.

5. In June 2003, the ZBA waived the minimum frontage requirement and granted Mongeau the right to construct a 60 ft. by 80 ft. structure on his property. This decision required that Mongeau submit his plans for approval by the Site Plan Review Committee and the Conservation Commission and stated that the variances granted to Mongeau would expire in one year. Appendix A-3.

6. Mongeau sought and received extensions of his variances from the ZBA (up to and including June 15, 2005) while he awaited approvals

from the Site Plan Review Committee and the City's Conservation Commission. Appendix A-3.

7. On May 23, 2005, Mongeau received final approval of the site plan from the Site Plan Review Committee and the City's Conservation Commission. Appendix A-3. The Conservation Commission's approval, however, was subject to certain conditions. Appendix A-3, 4. Reid was not a member of the Conservation Commission.

8. A citizen's group appealed the Conservation Commission's order of conditions to the Massachusetts Department of Environmental Protection ("DEP").[1]

9. Mongeau's variance lapsed on June 15, 2005, and the ZBA did not grant another extension. Appendix A-4.

10. On September 6, 2005, the Massachusetts DEP rejected the citizen's group appeal and affirmed the order of the Conservation Commission. Appendix A-4. Mongeau then applied for a building permit.

---

[1] In his complaint, Mongeau alleged "[o]n information and belief" that Reid had "orchestrated" this appeal. Appendix A-4. A mere allegation that a plaintiff is "informed and believes" that a fact exists is not a sufficient allegation that the fact does exist. Rather, a plaintiff must have sufficient data to justify interposing such an allegation in the first instance. *General Acc. Ins. Co. of America v. Fidelity and Deposit Co. of Maryland,* 598 F.Supp. 1223, 1231 (D.C.Pa. 1984).

11. On October 19, 2005, Respondent Reid denied the building permit, noting *inter alia* that the ZBA variance had expired. Appendix A-4. Reid specifically explained to Mongeau that if he wished to reestablish the variance he was to contact the ZBA.

12. Instead, on December 22, 2005, Mongeau filed suit in the Superior Court of Middlesex, Massachusetts, against the City and Reid, seeking a declaratory judgment that he was entitled to construct his building, injunctive relief ordering the City to issue him a building permit, and damages arising from violation of 42 U.S.C. § 1983 and Massachusetts state law. The case was removed to the United States District Court for the District of Massachusetts.[2]

B. The District Court Decision

The Respondents filed a motion for judgment on the pleadings in the United States District Court. On November 13, 2006, that Court granted judgment for the defendants on Mongeau's federal claims, and remanded the remaining state law claims to state court. Appendix B-21. Those state law claims are pending.

---

[2] Contrary to Petitioner's suggestion otherwise at page 5 of the Petition, the complaint did not mention either the Due Process Clause or the Fourteenth Amendment. Further, the Respondents removed the case based on the claim under 42 U.S.C. § 1983, and not "the due process issue."

The District Court concluded that there was nothing that distinguished Mongeau's claims from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. Appendix B-20. In particular, the Court said that to state a substantive due process violation, the plaintiff needed to allege that defendants acted in a manner that shocked the conscience, and that the alleged behavior was not so outrageous that it shocked the conscience.

The District Court also granted judgment in favor of Reid on his procedural due process claim and found that Reid was entitled to qualified immunity on claims against him in his personal capacity.

C. The First Circuit Decision

On appeal, although he had not raised the issue below, Mongeau argued that the test applied by the District Court to the substantive due process claim was inappropriate in the land use context and that, instead, the Court should use an "arbitrary and capricious" standard. Appendix A-6. He did not appeal the ruling in favor of the defendants on the procedural due process claims or the finding that Reid was entitled to qualified immunity on claims against him in his personal capacity. Appendix A-5, n. 2.

The First Circuit Court of Appeals reaffirmed its earlier holdings that a plaintiff may prevail on a substantive due process claim only if the defendant

had engaged in behavior that "shocks the conscience." Appendix A-10. Taking all of Mongeau's allegations as true, the Court did not see a conscience-shocking situation. It could discern nothing more than a run-of-the-mill dispute between a developer and a town official. Appendix A-11. The Court affirmed the judgment in favor of Reid.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO ACKNOWLEDGE OR CHALLENGE THIS COURT'S APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS*.

The Petition argues that *Lewis* had no intended impact beyond "the kind of impulsive action in police cases" and that various courts have "extended *Lewis*' 'shocks the conscience' analysis" to more "deliberative" government actions. (Pet., pp. 8-9).

However, the Petition fails to acknowledge that this Court applied *Lewis* to a land use matter in *Cuyahoga Falls*, *supra*, 538 U.S. at 198-199. There, this Court stated as follows:

> "We need not decide whether respondents had a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. *See County of*

> *Sacramento v. Lewis,* 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that in our evaluations of 'abusive executive action,' we have held that 'only the most egregious official conduct can be said to be "arbitrary in the constitutional sense"')."

In *Lewis*, this Court had reiterated that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression" and explained that "[t]o this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Lewis*, 523 U.S. at 847.

Notably, the Petition fails to even mention *City of Cuyahoga Falls* and, further, fails to appreciate that the *Lewis* standard equates "shocks the conscience" with "most egregious" and "arbitrary in the constitutional sense" and uses those terms interchangeably. As noted above, the Court's opinion in *Lewis* expressly draws that equation. So, too, does this Court's opinion in *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061 (1992), which involved an employee safety claim. In *Collins*, *supra*, the Court held, "We are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as *arbitrary, or conscience shocking,* in a constitutional sense." (Emphasis added).

The First Circuit Court of Appeals is in accord with this Court's decisions in this respect. In its decision in this matter, the First Circuit reiterated that "although the yardstick against which substantive due process violations are measured has been characterized in various ways, we are satisfied that, before a constitutional infringement occurs, state action must in and of itself be egregiously unacceptable, outrageous, or conscience-shocking." Appendix A-10.

The Petition should be denied because it does not challenge the foregoing applications of the *Lewis* standard. Indeed, as indicated in the discussion below, its claims of a split in the circuits as to the proper standard to be applied disregards *Lewis* and ignores this Court's holding in *Cuyahoga Falls*.

II. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S CIRCUIT ANALYSIS.

As just recently detailed to this Court in the Opposition to the Petition for Writ of Certiorari in *Eichenlaub v. Township of Indiana*, *supra,* a circuit review reveals that the petition's circuit analysis is off the mark and, indeed, confirms that there is no need for intervention by this Court.

The Second Circuit

The Petition claims a "conflict" exists between the First and Second Circuits because, it contends, the Second Circuit favors a rational basis test when analyzing substantive due process claims in a land-

use context. However, the Petition cites to a case, *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995), which pre-dates *Lewis*. It certainly, then, is not instructive on the Petition's claim of a conflict among the circuits on whether and where the *Lewis* "shocks the conscience" test controls.

In the other Second Circuit case cited, *O'Mara v. Township of Wappinger*, 485 F.3d 693 (2d Cir. 2007), the court dismissed the substantive due process claim on the ground that the plaintiff developers had no cognizable property interest under substantive due process that was violated when the town refused to grant a certificate of occupancy. As such, the Court said it was "unnecessary to reach the question of whether the Town's actions were arbitrary or irrational." *Id.* at 700.

As the Second Circuit explained in *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-263 (2d Cir. 1999), which involved building and zoning permits, "[f]or state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary' and 'outrageous', specifically citing *Lewis*. That Court also underscored the limited role that substantive due process and federal courts had in state land use cases.

Moreover, the Second Circuit, in *O'Connor v. Pierson*, 426 F.3d 187, 203 (2d Cir. 2005), expressly stated that *Lewis* "did not distinguish between different types of substantive due process claims, so 'constitutionally arbitrary' action for purposes of a

property-based substantive due process claim is action that shocks the conscience."

Given the above, the Second Circuit is not in conflict with the First Circuit.

The Third Circuit

The Petition acknowledges that the Third Circuit is in accord with the First Circuit. It also acknowledges that a petition for certiorari was filed in the Third Circuit case of *Eichenlaub* to test the "shocks the conscience" approach, and that this Court just recently denied that petition.

The Fourth Circuit

To position the Fourth Circuit, the Petition cites to a case that pre-dates *Lewis*. It cannot be expected that this case would discuss or apply the *Lewis* standard. The other Fourth Circuit case cited in the Petition, *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), recognized the extremely circumspect nature of substantive due process review in the post-*Lewis* era. That Court stated that a substantive due process claim is supported only where conduct "falls ... beyond the outer limits of legitimate governmental action." "Substantive due process protections 'run only to state action so arbitrary and irrational, so unjustified by any circumstance or government interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'" *Id.* at 440. Again, this is in keeping with *Lewis* and *Cuyahoga Falls*, and the First Circuit.

Indeed, in *Young v. City of Mt. Rainier*, 238 F.3d 567, 574 (4th Cir. 2001), the Fourth Circuit noted the broad applicability of the *Lewis* standard, stating that "only governmental conduct that 'shocks the conscience' is actionable as a violation of the Fourteenth Amendment." More recently, in *United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004), the court reconfirmed that "[a]n executive action can violate substantive due process only when the act shocks the conscience."

The Fifth Circuit

The Petition asserts that the Fifth Circuit is "in direct conflict" with the First Circuit because, in assessing a substantive due process claim in *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006), that Court determined whether the governmental action was "rationally related to a legitimate governmental interest." *Mikeska* cites to *Simi Inv. Co. v. Harris County,* 236 F.3d 240, 249 (5th Cir. 2000). In *Simi Inv.*, the Fifth Circuit stated that "[s]ubstantive due process analysis is appropriate only in cases in which government arbitrarily abuses its power to deprive individuals of constitutionally protected rights" and it specifically recognized that "reliance on substantive due process must be taken with the 'utmost care'," citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061 (1992). As noted above, in *Collins,* this Court referenced "arbitrary, or conscience shocking" behavior in "a constitutional sense."

Moreover, in *Conroe Creosoting Co. v. Montgomery County Texas*, 249 F.3d 337, 341 (5th

Cir. 2001), in which the plaintiff claimed a property right to designate property for sale, the Fifth Circuit explicitly noted that "Courts generally examine due process challenges to executive actions by asking 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Consequently, the Fifth Circuit too is aligned with the First, Second, Third and Fourth Circuits.

The Sixth Circuit

The Petition cites a single post-*Lewis* case from the Sixth Circuit, *Brody v. City of Mason*, 250 F.3d 432 (6th Cir. 2001). As stated in the Petition, the *Brody* court stated that, in a land-use case, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the ... [administrative] decision'." The Court recognized that "[t]his requires a very strong showing. 'The administrative action will withstand substantive due process attack unless it 'is not supportable on any rational basis'" or is "'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.'" *Id.* at 438. As noted above with respect to other "strict sense" or "constitutional sense" cases, this standard does not differ from the *Lewis* standard.

Moreover, two more recent cases underscore that the Sixth Circuit follows the *Lewis* standard. In *Banks v. City of Whitehall*, 344 F.3d 550, 554-55 (6th Cir. 2003), a land-use case, the Court rejected a

substantive due process claim, because "the conduct of Whitehall officials in enforcing those codes and regulations was neither 'arbitrary' nor 'conscience-shocking' in the constitutional sense." In *Midkiff v. Adams County Regional Water District*, 409 F.3d 758, 769 (6th Cir. 2005), in addressing the plaintiffs' substantive due process claim in the context of the Water District's termination of their water service without notice, the Court explained that substantive due process claims involve allegations of "(1) deprivations of a particular constitutional right and (2) actions that 'shock the conscience.'" That Court affirmed the dismissal of the plaintiffs' complaint.

The Sixth Circuit, too, then is aligned with those discussed above, as is the Seventh Circuit.

The Seventh Circuit

The Petition cites to the Seventh Circuit case of *Centres v. Town of Brookfield*, 148 F.3d 699 (7th Cir. 1998), as indicating that the Circuit employed a rational basis test. But, the Seventh Circuit acknowledged in *Centres* that, "in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate.... [T]hese requirements impose substantial burdens on the plaintiff, but those burdens are appropriate. Federal courts 'are not zoning boards of appeal." *Id.* at 704. The Court found that the plaintiff's allegation that the defendants acted contrary to state law and in an arbitrary and capricious manner did not supply the essential element of a separate constitutional violation.

In most recent substantive due process cases, the Seventh Circuit has expressly applied the *Lewis* standard. *See Christianson v. County of Boone*, 483 F.3d 454, 462 n.2 (7th Cir. 2007) ("When, as in the present case, a plaintiff complains of abusive executive action, this 'conscience shocking' test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts", citing *Lewis* as "clarifying this distinction."); *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005) (wrongful discharge claim) ("The scope of substantive due process ... is very limited and protects plaintiffs only against arbitrary government action that "shocks the conscience.")

The Ninth Circuit

The Petition cites two Ninth Circuit cases that pre-date *Lewis* and thus are not truly instructive. In any event, both of those cases use an "arbitrary" standard -- which *Cuyahoga Falls* equates with "conscience shocking."

As in the *Eichenlaub* petition, the Petition here also overlooks the tendency of the Ninth Circuit to heed this Court's admonition in *Lewis*, *supra*, 523 U.S. at 843, *Albright v. Oliver*, 510 U.S. 266, 272 (1994) and *Graham v. O'Connor*, 490 U.S. 386 (1989), that substantive due process claims should be analyzed under specific Amendments. Property claims are thus treated --- and largely dismissed --- under the Fifth Amendment's "taking clause." *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc); *Madison v. Graham*, 316 F.3d 867, 871 (9th Cir. 2002); *Squaw Valley Dev. Co. v.*

Goldberg, 375 F.3d 936, 949-50 (9th Cir. 2004) ("The parties have not cited to any post-*Armendariz* case, and our research has revealed none, where this Circuit upheld a substantive due process claim based on a deprivation of real property.").

Squaw Valley illustrates that the Ninth Circuit recognizes that "the touchstone of due process is protection of the individual against arbitrary action of government, and the substantive component of the Due Process Clause "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" *Squaw Valley*, 375 F.3d at 948.

The Petition cites to *Equity Lifestyle Prop. v. County of San Luis Obispo*, 2007 WL 2694677 (9th Cir. 2007) as a "recent case" but, in that case, the plaintiff's argument "challenges the foundation of the rent control law and would, if accepted, require its invalidation." This is a different focus and inquiry than that involved here.

The Eighth, Tenth and Eleventh Circuits

The Petition asserts that the Eighth, Tenth, and Eleventh Circuits are "embroiled in internal conflicts" over the appropriate standard in substantive due process land use cases, yet then acknowledges that all three circuits, in recent cases, have applied the *Lewis* "shocks the conscience" standard.

The Petition claims a conflict within the Eighth Circuit between a "truly irrational" test and the "shocks the conscience" test. However, *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001), referred to in the Petition on the "truly irrational" prong, did not cite or consider *Lewis*, but rested on decisions preceding *Lewis*. The other prong to the Petition's assertion, *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006), actually disproves the claim of an internal split because that case draws a clear equation between the "truly irrational" test and the "shocks the conscience" test. The same equation was noted by the en banc court in *Singleton v. Cecil*, 176 F.3d 419, 425 n.7 (8th Cir. 1999).

The Petition maintains the Tenth Circuit has a "similar inconsistency." It cites *Signature Props. Int'l Ltd. Partnership v. City of Edmond*, 310 F.3d 1258 (10th Cir. 2002), but the issue there was whether a developer's substantive due process claim against the city was ripe. The Court briefly mentioned an "arbitrariness" standard but, contrary to the Petition's suggestion, this reference is not "inconsistent" with the standard stated in *Camuglia v. City of Albuquerque*, 448 F.3d 1214 (10th Cir. 2006).

In *Camuglia*, the owner alleged his due process rights were violated when an inspector temporarily closed restaurant. He, however, presented no evidence that the inspector's actions "were arbitrary, capricious, or without a rational basis" and thus, the Court found, the allegations did not meet the high standard that this Court set for

substantive due process claims in *Lewis*. The Tenth Circuit explained that "[a]n arbitrary deprivation of an individual's property right can violate the substantive component of the Due Process Clause," but the arbitrariness must be "extreme." *Id.* at 1220. "The ultimate standard for determining whether there has been a substantive due process violation is whether the challenged government action shocks the conscience of federal judges." *Id.*

As for the Eleventh Circuit, the Petition acknowledges that it mirrors the First Circuit's view of *Lewis*.[3]

It is clear from the foregoing that, contrary to the Petition's assertions, the circuit courts are not in "confusion" or "conflict" about the proper standard to apply to a substantive due process claim in a land-use context. Specifically, *Lewis* and *Cuyahoga Falls* affirmed the movement in federal jurisprudence towards the restriction of the use of substantive due process as a means to expand federal oversight of matters within the purview of local authorities. While the Petition tries to fashion a split among the circuits, it is apparent that, in the post-*Lewis* era, the circuits have recognized the extremely circumspect nature of substantive due process review, including in the land-use context. There is no call for this Court's intervention.

---

[3] So, too, does the D.C. Circuit, of which the Petition makes no mention. *See Fraternal Order of Police Dep't of Corrections Labor Comm. v. Williams*, 375 F.3d 1141, 1145 (D.C. Cir. 2004).

III. APPLICATION OF A "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THIS COURT'S SUBSTANTIVE DUE PROCESS CASES.

The Petition states that applying the "shocks the conscience" standard to land use disputes is "in conflict with the opinions of this Court." As discussed above, however, the Petition fails to acknowledge *Cuyahoga Falls*, *supra*, 538 U.S. at 198-199, and fails to appreciate that this standard equates "shocks the conscience" with "most egregious" and "arbitrary in the constitutional sense". The application of a "shocks the conscience" standard in the land-use context follows the opinions of this Court.

The Petition's citation to this Court's decision in *Lingle v. Chevron*, 544 U.S. 528, 125 S.Ct. 2074 (2005), does not show otherwise. That case involved a takings claim, with an oil company challenging a governmental regulation as constituting an uncompensated take of property. Even there, this Court cited *Lewis*, stating that, in the context of a due process challenge, a regulation that fails to serve any legitimate governmental objective "may be so arbitrary or irrational that it runs afoul of the Due Process Clause." But such a test, this Court said, was not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Leonard H. Kesten*
Judy A. Levenson
Deidre Brennan Regan
Brody, Hardoon, Perkins & Kesten, LLP
One Exeter Plaza
Boston, Massachusetts 02116
(617) 880-7100

* *Counsel of Record*